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Federal Communications Commission

DA 96-1149

DISPATCH

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Amendment of Section 73.202(b) |) | MM Docket No. 94-70 |
| Table of Allotments, |) | RM-8474 |
| FM Broadcast Stations. |) | RM-8706 |
| (Moncks Corner, Kiawah Island, and |) | |
| Sampit, South Carolina) ¹ |) | |

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 17, 1996;

Released: July 19, 1996

By the Chief, Allocations Branch:

1. At the request of Ceder Carolina Limited Partnership ("petitioner"), licensee of Station WNST(FM) (formerly WJYQ(FM)), Channel 287C3, Moncks Corner, South Carolina, the Commission has before it the Notice of Proposed Rule Making, 9 FCC Rcd 3136 (1994), proposing the substitution of Channel 288C2 for Channel 287C3, the reallocation of Channel 288C2 from Moncks Corner to Kiawah Island, South Carolina, and the modification of Station WNST(FM)'s license accordingly (RM-8474).² Orville Ronald Brandon, court-appointed Receiver for Ceder Carolina Limited Partnership, filed comments in support of the proposal reaffirming his intention to apply for the channel, if reallocated to Kiawah Island. Comments and a counterproposal were filed by Sampit Broadcasting ("SB"), proposing the allotment of Channel 289A to Sampit, South Carolina, as the community's first local aural transmission service (RM-

¹The community of Sampit, South Carolina, has been added to the caption.

²When the petition was filed on May 6, 1994, Ceder Carolina Limited Partnership was permittee of Station WJYQ(FM), Channel 287C3, Moncks Corner, South Carolina. However, on July 26, 1994, Station WJYQ(FM)'s license (BLH-861218KB) and construction permit (BPH-910219IC) were involuntarily assigned to Orville Ronald Brandon ("Brandon"), court-appointed Receiver, and consummated on August 11, 1994. See File No. BALH-940707GE. Subsequently, on March 30, 1995, the construction permit and license were assigned from Brandon to L.M. Communications II South Carolina, Inc., and consummated on May 30, 1995. On November 10, 1995, the call signed was changed from WJYQ(FM) to WNST(FM). A license (BLH-950822KC) was issued on April 26, 1996 for Channel 287C3 at Moncks Corner.

8706).³ Gordon W. Hartwig, County Administrator, Georgetown County, South Carolina, filed comments in support of the Sampit proposal. In response to the Notice, Brandon and SB filed reply comments. Brandon also filed a "Motion for Summary Dismissal" and SB filed an untimely opposition to the motion.⁴ L.M. Communications and SB filed reply comments in response to the counterproposal.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules, which permit the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O") 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990) ("Change of Community MO&O"). In this regard, petitioner advises that the requested reallocation to Kiawah Island is mutually exclusive with the present allotment of Channel 287C3 at Moncks Corner, South Carolina. In support of the proposal, petitioner states that substitution of Channel 288C2 for Channel 287C3 at Moncks Corner (population 5,607)⁵ and

³Public Notice of the counterproposal was given on October 11, 1995, Report No. 2104, RM-8706.

SB also proposed the downgrade of Station WNST(FM) from Channel 287C3 to Channel 287A at Moncks Corner, South Carolina, and the allotment of Channel 288A at Kiawah Island, South Carolina. However, only the proposal for the allotment of Channel 289A at Sampit, South Carolina, was accepted and placed on Public Notice since there were no expressions of interest for Class A allotments at either Moncks Corner or Kiawah Island. Consequently, since it is the Commission's policy refrain from making allotments to a community absent an expression of interest, Sampit's proposed allotments at Moncks Corner and Kiawah Island were not considered.

Moreover, we note that Brandon filed a "Motion for Summary Dismissal" requesting that the counterproposal be dismissed because (1) SB failed to indicate it would apply for two of the three proposed Class A channels; (2) the proposed channels for Moncks Corner and Kiawah Island would require the involuntary downgrade of Station WNST(FM); and (3) the proposed allotments are dependent upon the involuntary relocation of Station's WNST(FM)'s authorized transmitter site. Because SB's proposed allotments at Moncks Corner and Kiawah Island were not considered in this proceeding, we need not address the arguments raised by Brandon. Accordingly, will dismiss Brandon's motion as moot.

⁴SB's opposition was not accompanied by a motion to accept. The Commission's Rules do not contemplate the acceptance of pleadings filed beyond the comment cycle unless specifically requested or authorized by the Commission. See Section 1.415(d) of the Commission's Rules. Furthermore, in light of the action taken in this proceeding, SB's opposition is moot.

⁵All population figures taken from the 1990 U.S. Census, unless otherwise specified.

the reallocation of the channel to Kiawah Island (population 718), would provide the community with its first local aural transmission service, and would not deprive Moncks Corner of its sole local aural transmission service.⁶

3. Comments. In its comments, Brandon states that the reallocation of Channel 288C2 to Kiawah Island would enable Station WNST(FM) to provide service to 468,867 persons compared to Class A service area which now serves only 226,341 persons. Thus, the reallocation would provide 250,238 persons with new reception service, while only 7,712 persons would lose reception service. Brandon further states that the majority of the gain area is located in southeastern Dorchester County, western Charlestown County and eastern Colleton County, South Carolina. Brandon claims that all of the gain area receives more than five reception services. Brandon contends that there are numerous other FM stations which provide 1.0 mV/m service to portions of the gain area. Brandon advises that a calculation of available AM services in the gain area was not made, since the area is adequately served by a minimum of five full-time FM stations.

4. In its counterproposal, SB proposes the allotment of Channel 289A to Sampit, South Carolina, as the community's first local aural transmission service. SB asserts that Channel 289A can be allotted to Sampit in compliance with the Commission's technical requirements under Section 73.207(a), (b). SB states that Sampit is not incorporated, thus, the community's "boundaries are indefinite and subject to interpretation." SB further states that there are numerous churches and a school in the community, and that the Sampit Community Organization, Inc., represents the community, because it provides input to the various government organizations, including the Georgetown County Government and the Georgetown County Planning Commission ("GCPC"). SB submits a letter from GCPC stating, inter alia, that the estimated population of Sampit is approximately 2,607 persons. SB states its intention to apply for Channel 289A, if allotted to Sampit.

5. In its comments, SB claims that the proposed site for Kiawah Island is located in a tidal marsh and is in close proximity to the Charleston Executive Airport "where towers are highly likely to be restricted to an unusable height." SB submits a technical statement showing that there is no usable site that would not be severely limited due to aeronautical and environmental constraints, citing Ocracoke, North Carolina, et al., 9 FCC Rcd 2011 (1994).

6. Moreover, SB argues that the Commission previously rejected the Kiawah Island proposal, finding that it was a "community" for allotment purposes, but that the upgrade and reallocation Kiawah Island would not provide sufficient public interest benefits to warrant the loss

⁶Station WMCJ(AM) is also licensed to Moncks Corner.

of Moncks Corner's sole competitive local transmission service. SB further argues that although the instant proposal "attempted" to address one of the Commission's concerns by moving its proposed site closer to Moncks Corner, it does not address the loss of the community's sole competitive transmission. Finally, SB asserts that the allotment of Channel 289A at Sampit would result in a preferential arrangement of allotments since it would provide the community with its first local aural transmission, triggering allotment priority (3). Accordingly, consistent with the FM allotments priorities, SB maintains that the Sampit proposal should be preferred.

7. In its reply comments, Brandon avers that SB's arguments are without merit and represent an attempt to hinder and delay Station's WNST(FM)'s efforts to upgrade and improve its facilities. Brandon rejects SB's claim that the proposed Kiawah Island site is located in a tidal marsh and is in close proximity to the Charleston Executive Airport where towers are "highly likely to be restricted to an unusable height." Brandon argues that SB has failed to provide substantive evidence supporting these allegations. Nevertheless, if they were true, Brandon contends that the allegations do not provide the basis for the denial of the upgrade. Furthermore, Brandon provides a technical exhibit demonstrating that Station WNST(FM)'s proposed site was selected in order to maintain predicted interference-free service to Moncks Corner, and to minimize the potential loss area compared to the authorized service from the station. Since Kiawah Island is a coastal community, Brandon acknowledges that a portion of the fully-spaced reference site zone may be located in a tidal marsh. However, Brandon maintains that the area includes a "substantial area" within which a suitable site can readily be located. Moreover, Brandon argues that it is well-established that the Commission does not require detailed showings regarding the availability or suitability of a particular site in rulemaking proceedings to allot FM channels, beyond the requirement that an adequate signal be placed over the community from an identifiable site which conforms to the spacing rules, citing Key West, Florida, 3 FCC Rcd 6423 (1988). Brandon further argues that site selection and determination of site availability/suitability are ascertained at the application stage and are not routinely considered at the allotment stage. Brandon submits that SB has failed to demonstrate a "sufficiently compelling showing" that no site exists which complies with the Commission's fundamental technical rules. Instead, Brandon claims that SB's allegations are merely speculative and unsubstantiated.

8. Finally, Brandon acknowledges that the Commission has previously denied Station WNST(FM)'s request for a Class C2 allotment at Kiawah Island in favor of a Class C3 allotment. However, Brandon maintains that the spacing considerations limiting the location of a Class C2 transmitter site for Kiawah Island has changed since the 1992 decision in MM Docket No. 91-127. Brandon further claims that the loss of interference-free service across Moncks Corner, which was the prominent factor for the denial, could now be substantially reduced by a station

operating within the permissible fully-spaced site zone for Channel 288C2 at Kiawah Island.⁷ Brandon concludes that this fact not only distinguishes the instant rulemaking request from the previous one, but also provides the basis for the grant of the Kiawah Island proposal.

9. In reply comments to its Sampit counterproposal, SB reiterates its earlier advanced comments. In addition, SB challenges Brandon's claim that the proposed upgrade and reallocation would result in gain of service to more than 250,000 persons and a "minuscule" loss of service to fewer than 7,800 persons. SB argues the comparison should have been made for the service area for Channel 287C3 in lieu of Channel 288A, which was deleted from Moncks Corner pursuant to MM Docket No. 91-127, citing Blackville, South Carolina, et al., supra. SB submits a technical statement showing that when properly compared, there would be a population gain of only 14,913 persons, not 250,238 persons as claimed by Brandon. SB's claims the statement also shows that (a) if the adequately served population within the Charleston Urbanized Area is excluded, the population gain shrinks to 491 persons; (b) the area of coverage would result in a loss for the Class C2 allotment; and (c) 55% of the proposed Class C2 coverage would be over the Atlantic Ocean. Therefore, SB maintains that the reallocation of Channel 288C2 to Kiawah Island would cover only 3,849 square kilometers (1,486 square miles), while the present authorized Class C3 service area serves 4,254.1 square kilometers (1,643 square miles), resulting in a net loss of service to an area of 405 square kilometers (156 square miles). Finally, SB reiterates its claim that the allotment of Channel 289A at Sampit, South Carolina, would result in a preferential arrangement of allotments, and should be preferred over the reallocation of Channel 288C2 to Kiawah Island.

10. L.M. Communications filed reply comments to the counterproposal reiterating earlier advanced comments in support of the Kiawah Island proposal. In addition, L.M. Communications advised that on May 30, 1995, the license and construction permit authorizations for Station WNST(FM) were assigned from Brandon to L.M. Communications, at which time Station WNST(FM) was off the air. L.M. Communications filed an application to modify Station WNST(FM)'s construction permit which was granted on July 5, 1995. Station WNST(FM) resumed operations on July 28, 1995 pursuant to program test authority.⁸ L.M. Communications reiterates its earlier advanced arguments opposing the Sampit proposal.

11. Moreover, L.M. Communications argues that Sampit is not a sufficiently sizable, distinct place to qualify as a "community" for allotment purposes. L.M. Communications

⁷Indeed, Brandon claims that the technical exhibit submitted with the rulemaking petition further asserts that because of the additional flexibility that will be available to station WNST(FM) at the application stage, the station will likely be able to provide better than 1.0 mV/m service across all of Moncks Corner.

⁸ L.M. Communications applied for and was granted a license on April 26, 1996. See n.2, supra.

contends that SB has not demonstrated that Sampit is a "geographically identifiable population grouping" by presenting evidence of other indicia of "community" status such as political, social, or business organizations, or by providing the testimony of local residents, citing Hannibal, Ohio, 6 FCC Rcd 2144 (1991). L.M. Communications further contends that mere geographic location is not sufficient to establish "community" status, citing Hannibal, Ohio, supra; and Clark, Colorado, 10 FCC Rcd 7635, n.2 (1995). Sampit, states L.M. Communications, is neither incorporated nor recognized by the U.S. Census as a Census Designated Place. L.M. Communications further states that Sampit has no local government, post office, or zip code. All mail sent from the area bears the Georgetown, South Carolina postmark. L.M. Communications argues that the counterproposal fails to demonstrate that the residents of Sampit receive any municipal services, such as police or water, from any organization or entity associated with Sampit. L.M. Communications alleges that the list of organizations and businesses submitted by SB is inaccurate and misleading. For example, L.M. Communications claims that the listed fire department and water and sewer services are provided by Georgetown County and not Sampit. Finally, L.M. Communications submits a declaration of the findings of Lynn M. Martin after an on-site investigation which revealed that Sampit is a rural area with no mayor or city government, no post office, no police department, no public library, and no junior high or high school. Therefore, L.M. Communications concludes that the complete lack of any political, social, business organizations or any extensive commercial area in Sampit indicates that it is in fact a rural area contiguous to and dependent upon the larger community of Georgetown, South Carolina.

12. In its reply comments to the counterproposal, SB reiterates its earlier advanced comments in support of the proposal. In addition, SB rejects L.M. Communications' claim that Sampit is not a "community" for allotment purposes. In this regard, SB states that Sampit possesses the requisite political, economic, and social components commonly associated with community status, citing East Hemet, California, 67 RR 2d 146 (1989). SB further states that Sampit is the home of numerous businesses, churches, community groups, and an elementary school, many of which have the name "Sampit" in their titles. The existence of these businesses and organizations and the fact that many of them have "Sampit" in their names, argues SB, is evidence that Sampit is a thriving community in South Carolina, citing Belfry and Harold, Kentucky, 6 FCC Rcd 6019 (1991); and Virgie, Kentucky, 4 FCC Rcd 7475 (1989). SB claims that citizens of Sampit view themselves as a separate community, submitting letters from the Georgetown County Administrator, the Georgetown County Assistant Planning Director, and the Co-Chairman of the Sampit Community Organization. SB further claims that the evidence shows that the residents of Sampit have a strong sense of community, citing Willows and Dunnigan, California, 10 FCC Rcd 11522 (1995). While Sampit does not provide every municipal service, SB argues that a proponent is not required to demonstrate that a community provides every municipal service in order to merit a finding of "community" status, citing Willows and Dunnigan, California, supra. Moreover, a community need not exhibit each of the indicia of

"community" status to be considered for allotment purposes, citing Semora, North Carolina, et al., 5 FCC Rcd 934, 935 (1990). SB cites several "similar" cases where FM allotments have been made to small, unincorporated communities seeking a first local FM transmission services. SB concludes that it has sufficiently demonstrated that Sampit possesses the indicia to establish it as a "community" for allotment purposes, that Sampit has its own boundaries, that Sampit has an "estimated" population of approximately 1,000 to 2,600 persons,⁹ and that the residents of Sampit consider themselves to be members of a separate community. Therefore, SB concludes that the Commission should find that Sampit is a "community" for allotment purposes and that the public interest would be served by the allotment of a new FM channel at Sampit. SB reaffirms its intention to apply for Channel 289A, if allotted to Sampit.

13. Discussion. After careful consideration of the information before us, we find both proposals to be technically and/or legally deficient, as discussed below. As a result, we need not analyze the Kiawah Island proposal under our change of community of license policies or compare the Kiawah Island and Sampit proposals under our FM allotment priorities.¹⁰

14. First, we address the proposal to upgrade Channel 287C3 to Channel 288C2 and to reallocate Channel 288C2 from Moncks Corner to Kiawah Island, South Carolina. Although the Commission generally presumes in rulemaking proceedings that a technically feasible site is available, that presumption is rebuttable. In this case, we believe that the presumption of site availability has been sufficiently raised and that we must make a determination on the reasonable likelihood that a suitable site will be available. See San Clemente, California, 3 FCC Rcd 6728 (1988), appeal dismissed sub. nom. Mount Wilson, FM Broadcasters, Inc. v. FCC, 884 F.2d 1462 (D.C. Cir. 1989); and Washington and Wilmington, North Carolina, 51 RR 2d 1297 (1982). In this regard, the proponent concedes that Kiawah Island is a coastal community and there is a likelihood that the proposed site is in a tidal marsh, but also claims there is a "substantial area" for a suitable site. However, our engineering analysis has determined that although the entire area is approximately 130 square kilometers (50 square miles), it appears that the area is marshy and close to an airport. We do not consider a marshy area to constitute an available site, as we believe it is doubtful that permission would be granted for a transmitter site in any of the area. Moreover, the Federal Aviation Administration ("FAA") has advised that it is unlikely that a 150 meter tower (492 feet) (or even a 50 meter tower (164 feet)) would be approved at the proposed site because of its proximity to an airport, as well as the possibility that the area may be too marshy for construction. See Ocracoke, North Carolina, et al., *supra*. As a result, we do not

⁹Population estimates were submitted in a letter from David Essex, Assistant Planning Director for the Georgetown County Planning Commission.

¹⁰The FM allotment priorities are: (1) First full-time aural service; (2) Second full-time aural service; (3) first local service; and (4) Other public interest matters. [Co-equal weight given to priorities (2) and (3)].

believe that there is a suitable or available site for upgrading Channel 287C3 to Channel 288C2 and reallocating the channel to Kiawah Island.

15. We turn now to the Sampit, South Carolina counterproposal. Based on the information submitted by proponent and the rebuttal showing of L.M. Communications, we do not believe that Sampit is a "community" for allotment purposes. The Commission's long-standing policy is to require allotments be made to communities composed of "geographically identifiable population groupings." This requirement is generally satisfied if the proposed community is either incorporated or listed in the U.S. Census. Although the 1995 Rand McNally Commercial Atlas lists Sampit as having a population of 150 persons, the community is neither incorporated nor listed in the U.S. Census. In this regard, the Commission has stated geographical location is not sufficient to establish "community" status. See Vimville, Mississippi, 48 FR 5974 (1983); and Hannibal, Ohio, *supra*. We note that Sampit has a zip code, but has no post office. However, the presence of a zip code and/or post office is not sufficient to establish "community" status. See Coker, Alabama, 43 RR 2d 190 (1978). Although the proponent lists thirty-nine entities (some businesses, several churches, an elementary school, and several civic organizations), the proponent does not give the addresses of the entities verifying that they specifically identify themselves with Sampit or show that they intend to serve the needs of Sampit as opposed to the communities of Georgetown or Andrews.¹¹ In the past, the Commission has rejected claims of "community" status where a nexus has not been shown between the political, social, and commercial organizations and the community in question. See Gretna, Florida, et al., 6 FCC Rcd 633 (1991), and cases cited therein.

16. Likewise, the two letters from officials of Georgetown County, South Carolina, do not persuade us that Sampit is a "community" for allotment purposes. In the first letter, the County Administrator alleges that Sampit is a viable community with its own neighborhood associations, businesses, churches, and school and that the residents of Sampit consider themselves to be residents of Sampit and have a strong identity with their community. However, as discussed in the preceding paragraph, no nexus has been demonstrated between most of these entities and the community of Sampit. Further, we do not have statements or affidavits from

¹¹We acknowledge that eleven of the entities incorporate the word "Sampit" in their trade names. However, proponent fails to show addresses for these entities or to rebut L.M. Communications' argument that the entities bear the "Sampit" trade name because of their proximity to the Sampit River as opposed to their location in the community of Sampit.

actual residents of Sampit indicating that they perceive themselves to be part of a Sampit community.¹² See Semora, North Carolina, et al., supra.

17. In the second letter, the Assistant Planning Director of Georgetown County acknowledges that Sampit has no defined boundaries but submits a map depicting the Sampit area. Our review of this map indicates that Sampit is a widely scattered rural area that appears to be similar in size to a township and could contain several communities. Our policy is to allot FM channels to communities, not larger political divisions such as townships or counties. Furthermore, proponent has not shown other indicia for "community" status such as a local government, municipal services (e.g., police department, fire department, hospital, post office, libraries, banks, etc.), or a local newspaper. Therefore, we believe that based upon the record before us, Sampit is not a "community" for allotment purposes.

18. Accordingly, IT IS ORDERED, That the petition for rule making filed by Ceder Carolina Limited Partnership (RM-8474), IS DENIED.

19. IT IS FURTHER ORDERED, That the counterproposal filed by Sampit Broadcasting (RM-8706), IS DENIED.

20. IT IS FURTHER ORDERED, That the "Motion for Summary Dismissal" filed by Orville Ronald Brandon, court-appointed Receiver for Ceder Carolina Limited Partnership, IS DISMISSED as moot.

21. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

22. For further information concerning this proceeding, contact Sharon P. McDonald, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

¹²We note that a letter was submitted by the Co-Chairman of the Sampit Community Organization, but the letter shows no address indicating that the organization is located in the community of Sampit.